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In The Supreme Court Of The United States

OCTOBER TERM 1995

JOSEPH J. VOYTEK,

Petitioner,

v.

UNIVERSITY OF CALIFORNIA and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions arising under the Americans With Disabilities Act and the Rehabilitation Act of 1973, as these laws apply to persons with a mental disability:

1. On the question whether an employee was a "qualified individual with a disability" within the meaning of the Americans With Disabilities Act and the Rehabilitation Act of 1973, should the courts defer to the opinion of a private psychiatrist, retained by the employer, that an employee's mental condition made him unsuitable to handle the stress of a management-level job?

2. Does the Americans With Disabilities Act apply to employees who were seeking job accommodations from their employer on the effective date of the law?

LIST OF PARTIES

The parties to the proceedings below and before this court are:

1. Joseph J. Voytek
2. The University of California
3. The Regents of the University of California.

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PETITION FOR WRIT OF CERTIORARI

Joseph J. Voytek ("Voytek" or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on February 14, 1996.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit filed February 14, 1996, is not officially published and is reprinted at App. pages A47-A49, *infra*. Its unofficial citations are 77 F.3d 491 and 1996 WL 65243. The Order and Judgment of the United States District Court for the Northern District of California is not officially published and is reprinted at App. pages A1-A45, *infra*. The District Court's opinion is unofficially published at 6 A.D.D. 1137, 5 N.D.L.R. ¶ 343, 1994 WL 478805. The Order filed March 27, 1996, denying rehearing is unpublished and is reprinted at App. page A50, *infra*.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on February 14, 1996. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on February 14, 1996. On March 27, 1996, the Ninth Circuit denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S.Sup.Ct. Rule 13.1 and 13.3.

STATUTES INVOLVED

1. Section 504(a) of the Rehabilitation Act of 1973, as amended as of 1988 (29 U.S.C. § 794(a)) prior to amendments conforming the Rehabilitation Act to the Americans With Disabilities Act (P.L. 102-569, 106 Stat. 4360) provides, in relevant part:

> "No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program of activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

2. Section 101(8) of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12111(8)) provides:

> "QUALIFIED INDIVIDUAL WITH A DISABILITY.--The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

3. Section 101(9) of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12111(9)) provides, in relevant part:

> "REASONABLE ACCOMMODATION.--The term 'reasonable accommodation' may include--
>
> "(B) job restructuring, part-time of modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

4. Section 102 of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12112) provides, in relevant part:

> "(a) GENERAL RULE.--No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employment compensation, job training, and other terms, conditions, and privileges of employment.
>
> "(b) CONSTRUCTION.--As used in subsection (a) of this section, the term 'discriminate' includes--
>
> "(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would

impose an undue hardship on the operation of the business of such covered entity; or

"(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant."

6. Section 108 of the Americans With Disabilities Act of 1990 (104 Stat. 337) provides:

"This title shall become effective 24 months after the date of enactment (July 26, 1990)."

REGULATIONS INVOLVED

1. The Department of Education Rehabilitation Act regulations (34 C.F.R. Part 104) provide in relevant part:

34 C.F.R. § 104.3:

"(k) *Qualified handicapped person* means:

"(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question".

34 C.F.R. § 104.12:

"(a) A recipient shall make reasonable

accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."

"(b) Reasonable accommodation may include: * * * (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions."

"(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant."

STATEMENT OF THE CASE

This case presents an important issues as to the duty of employers to accommodate mental disabilities of their employees, as required by the Americans with Disabilities Act and the Rehabilitation Act of 1973 and whether the ADA is effective for employees whose efforts to seek accommodation began prior to its effective date but continued after the law went into effect. In particular, this case directly raises the question whether courts should defer to the opinion of a private psychiatrist that an employee's mental condition made him unable to handle the stress of a management-level job. This is an important question this Court noted, but left open, in School Bd. of Nassau County, Fla. v. Arline (1987) 480 U.S. 273, 288 n. 18, and which it should now resolve.

Jurisdiction of the district court was invoked under

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and under the Americans With Disabilities Act of 1990 ("ADA") (42 U.S.C. § 12101 et seq.) pursuant to section 505 of the Rehabilitation Act (29 U.S.C. § 794a), section 107 of the ADA (42 U.S.C. § 12117) and section 706(f)(3) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f)(3)).

This case arises from Petitioner's efforts to seek work accommodation at his job at the University of California in Berkeley because he suffers from a mental condition known as Major depression.[1]

Granting the University's motion for Summary Judgment, the District Court concluded that Petitioner's mental disability made it impossible for him to perform the functions of a management-level position and that there was no reasonable way his mental disability could be accommodated by the University (App. pp. A20-A40). In reaching this conclusion, the District Court relied on the opinion of Dr. Melvin Lipsett, a psychiatrist retained by the University to examine Petitioner in connection with his claim for disability benefits (App. pp. A5-A8). On the basis of this psychiatric opinion, the District Court concluded that Petitioner was not qualified for the job he held and that the University was justified in refusing to restructure Petitioner's to accommodate this disability (App. pp. A28, A31-32, A35-

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[1] See generally, Mintz, J., et al.; Treatments of Depression and the Functional Capacity to Work, *Arch.Gen.Psychiatry* 1992; 49:761-768 (Mintz, "Treatments of Depression"); National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990; Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986.

A39, A39-A40).[2]

The District Court also concluded that the Americans With Disabilities Act did not apply Petitioner's continuing efforts to obtain accommodation at the University during the period he was on disability leave since these efforts began before the effective date of the ADA (App. p. A44-A45).

On appeal, the Ninth Circuit affirmed the District Court. The Ninth Circuit also concluded that Petitioners disability made him unqualified for his job because "he could not carry out his duties as associate director due to his inability to handle the stress of a management-level position" (App. p. A48).

Petitioner seeks review in this Court to set aside the lower courts' decisions which have undermined the protections of federal law for employees with mental disabilities by making the opinion of a psychiatrist retained by the employer conclusive on the issue of Petitioner qualifications for his job and the ability of the University to accommodate his disability. The material facts necessary to understand these issues are as follows:

In December 1989, Petitioner began working as an Associate Director, Program Planning and Resources ("PPR") at the Office of Environmental Health and Safety ("EH&S") at the University of California in Berkeley ("UCB").

After performing in Associate Director position for sightly over a year, Petitioner began to experience increasing fatigue because he was working excessive hours. Fearing that his increasing fatigue would bring on an episode of

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[2] The District Court also concluded that a job offer of a related position at the University of San Francisco ("UCSF") and rehabilitation counseling satisfied any other remaining duty the University had to accommodate Petitioner's disability.

depression, Petitioner took an emergency medical leave in April 1991.

Upon returning to work two weeks later, Petitioner sought to have the duties of his position restructured to avoid excessive overwork and fatigue. In response, his supervisor, Julia Epley, Director of EH&S, stated that no changes in the job were possible.

Because Petitioner had taken emergency leave due to work stress, Petitioner was sent for a psychiatric examination in connection with California's workers compensation system. In early May 1991, he was examined by a physician, Dr. Melvin Lipsett, selected by the University.

Dr. Lipsett's initial written report placed no restrictions on Petitioner's work as Associate Director (App. p. A73, ¶ 13). In response to a telephone call from Dr. Lipsett indicating that he was placing no job restrictions on Petitioner, UC officials provided Dr. Lipsett information about work conflict between Petitioner and Epley which resulted in a change to Dr. Lipsett's medical opinion (id.). In late June, Dr. Lipsett issued a changed report which concluded that Petitioners was unable to perform the Associate Director job because of the stress of doing so threatened to bring on episodes of depression (App. pp. A6-A8).

As a result of Dr. Lipsett's changed report, on June 29, 1991, the University placed Petitioner on permanent disability leave.[3]

While on disability leave, Petitioner made numerous applications to various open positions at the University.

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[3] In its various summary judgment papers, UC admitted that plaintiff was removed from his position at EH&S because of Dr. Lipsett's medical evaluation, not because of poor performance or lack of job-related qualifications.

Because of the medical limitations imposed on Petitioner that he could not function in the stressful environment of a management-level job, the University would not consider him for any management-level positions to which he applied (App. pp. A13-A17, A36).

Shortly after being placed on disability leave, Petitioner filed a grievance under the University's internal grievance procedure (App. pp. A11-A12, A77-A78). This procedure resulted in a decision by Vice Chancellor Daniel Boggan, Jr. which directed (App. p. A78):

> "you [Petitioner] * * * and Director Epley, to work very closely with Human Resources concerning issues of accommodation."

Petitioner accepted this proposal, but the University did not follow up on Vice Chancellor Boggan's directive. When Petitioner raised the issue that nothing was happening as to Boggan's direction to discuss accommodation, the University responded by letter of August 14, 1992, stating that Petitioner should initiate another internal review proceeding to challenge UC's failure to follow Boggan's directions (App. pp. A79-A80).

Dr. Lipsett's opinion formed the basis for the lower court's holding that, because of his mental condition, Petitioner could not meet the essential qualifications of the Associate Director position and that no accommodation of duties of that position were reasonably possible.[4] The

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[4] The District Court expressed some confusion over the nature of Petitioner's disability and its effect on his ability to work (App. pp. A19-A20, A28), apparently because Dr. Lipsett described Petitioner's work problems as resulting from a "character defect" rather than from a depressive disorder. There was no reason for this confusion and no reason to believe that Petitioner's alleged "character defect" is materially different that his mental disability of Major depression. The diagnosis of Petitioner's mental condition as Major depression is long-

District Court cited two reasons for Petitioner's lack of qualifications (App. pp. A31-A32): First, the University's medical opinions that Petitioner "should not return to his job"(App. p. A31)[5] and second, Petitioner had "requested that the position be altered so that he would be capable of continuing in the position" (App. p. A32).

The District Court also concluded that no job accommodation was possible "since [Petitioner] could not mentally/emotionally handle the stress of managing more than a few employees, could not have a job with open-ended assignments, and that he should not work with Julia Epley" (App. p. A35). Again, Petitioner's disability was the very reason why no accommodation was possible: "The evidence is overwhelming that [Petitioner's] character structure combined with his depressive disorder made him incapable of fulfilling the responsibilities in a position such as the

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standing (App. p. A69) and Dr. Lipsett's deposition testimony unequivocally stated that the danger to Petitioner of continuing at EH&S was the risk of a further episode of depression at some future time (App. p. A65, A66-A67). The work problems Dr. Lipsett identified as resulting from a "character defect" are characteristic of persons suffering from Major depression (Mintz, J., et al.; Treatments of Depression and the Functional Capacity to Work, *Arch.Gen.Psychiatry* 1992; 49:761-768 (Mintz, "Treatments of Depression"), at p. 766).

[5] In addition to Dr. Lipsett's opinion, the University offered the opinion of Dr. Michael M. Gamble. While Dr. Gamble agreed with the diagnosis of Petitioner as suffering from major depression, Dr. Gamble's opinion as to Petitioner's work abilities was more equivocal as to Petitioner's asserted inability to perform his job: Rather than asserting the Petitioner was unqualified for his job, Dr. Gamble would state only that "Voytek would not be suited to management-level positions", including the Associate Director position at EH&S and that Petitioner was "unwilling[] to accept some of the limitations placed upon him for his psychological well-being" (App. p. A59).

Associate Director position at EH&S" (App. p. A36). In rejecting Petitioner's various proposals that he could perform the essential job functions of the Associate Director with accommodation, the District Court again referred "to the overwhelming evidence that Mr. Voytek's condition requires that he have a job drastically different from the EH&S job" (App. p. A38).

Because of its conclusion that Petitioner was unqualified for the Associate Director position, with or without reasonable accommodation, the District Court held that, UC had reasonably accommodated Petitioner by offering him a comparable position at the University of California at San Francisco ("UCSF") in mid-June, shortly before being placed on disability leave, and providing him rehabilitation training in the 15 months thereafter (App. pp. A12-A13, A41-A42).[6]

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[6] The District Court noted the Petitioner declined interest in the UCSF position because he felt that he was too exhausted at that point to try a new job and did not desire a demotion (App. p. A13-A14) but did not address whether this was a reasonable basis on which to decline the possible UCSF job. The District Court also noted, but gave no weight to, the outcome of the University's internal grievance procedure (App. pp. A11-A12).

REASONS FOR GRANTING THE WRIT

I. ON THE QUESTION WHETHER THE EMPLOYEE WAS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973, COURTS SHOULD NOT DEFER TO THE OPINION OF A PRIVATE PSYCHIATRIST, RETAINED BY THE EMPLOYER, THAT AN EMPLOYEE'S MENTAL CONDITION MADE HIM UNSUITABLE TO HANDLE THE STRESS OF A MANAGEMENT-LEVEL JOB.

Petitioner suffers from a depressive disorder that affects him and many other Americans in their jobs and lives. The national scope of these problems is well-documented in the medical literature on depression and its treatment. Depressive disorders affect over 17 million American adults (National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990). Major depression alone affects over 9 million American adults, almost half of the persons suffering from one of the three recognized kinds of depressive disorders (id.).[7] See also, Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986.

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[7] The National Institute of Mental Health classifies Depressive (affective) disorders into three classes: Manic-depressive illness (Bipolar disorder), Major depression, and Dysthymia (National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990).

The Americans With Disabilities Act ("ADA")[8] and the Rehabilitation Act of 1973 protect Petitioner and other employees with mental disabilities from job discrimination based on stereotypes and assumptions as to what they can and cannot do.[9] These laws "protect[] handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fears * * *" (School Bd. of Nassau County, Fla. v. Arline (1987) 480 U.S. 273, 287):

> "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect. * * * Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus" (Alexander v. Choate (1985) 469 U.S. 287, 295-296).

In School Bd. of Nassau County, Fla. v. Arline, *supra*, 480 U.S.at 280-288, this Court addressed the need to protect disabled employees from discrimination based on unfounded fears and stereotypes as to the risk of injury. In Arline, this Court addressed a physical condition, tuberculosis in a state of remission, and the fear that that disease would be contagious to others. This Court held that a non-imminent threat of future contagion was not enough to

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[8] The ADA went into effect July 26, 1992, during the period Petitioner was on disability and seeking accommodation at the University.

[9] Both the ADA and the Rehabilitation Act cover employees with mental disabilities (29 U.S.C. sec. 706(8)(B); 42 U.S.C. §12102(2)).

justify a conclusion that the employee was unqualified for the position.[10]

In Arline, however, the employer's defense rested on its own, unsubstantiated fears that the employee's disease might be presently contagious (id., 480 U.S. at 284-286). This Court noted that there was no medical evidence offered on the issue of the risk of infection of others created by the employee's disability (id., 480 U.S. at 288).

This Court then described how the lower courts should address medical evidence on this subject (id., 480 U.S. at 288). As to public heath officials, this Court established a general rule that courts should defer to their medical judgment:

> "In making these findings [of risk to others], courts normally should defer to the reasonable medical judgments of public health officials" (id., 480 U.S. at 288).

However, while deferral to public health officials is to be the norm, this Court carefully left open the question whether courts should also defer to the medical opinions of private physicians (id., 480 U.S. at 288 n. 18). The Court expressly reserved decision on that issue (id., 480 U.S. at 288 n. 18):

> "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied."

This Petition presents the question left open in Arline: whether the courts should defer to the medical judgments of

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[10] This Court remanded the case for specific findings, including medical findings as to the probability of transmission of the disease, and the duration and severity of the condition (id., 480 U.S. at 288-289).

private physicians retained by the interested employer.

In this case, the lower courts have deferred to the medical opinion of the University's psychiatrists that Petitioner was unable to handle the stress of a management-level job. By deferring to the medical opinions of Dr. Lipsett and Dr. Gamble, the lower courts have given controlling weight to these opinions rather than taking these opinions as simply one factor among others.

The result of this deference was to reintroduce stereotypes and patronizing attitudes towards disabled employees that the ADA and the Rehabilitation Act were intended to eliminate. This error is evident from the lower courts' uncritical claim that the medical evidence established that Petitioner was unable to handle the stress of a management-level job. While Dr. Lipsett, and to a degree Dr. Gamble, gave that general opinion, the health risk that the University's doctors identified was the risk that uncontrolled stress for Petitioner could result in an episode of depression sometime in the future (App. pp. A8, A65, A66-A67). This opinion rested entirely on the view of Dr. Lipsett, and later Dr. Gamble, that a less-stressful job would be more appropriate or best for Petitioner (App. pp. A6-A8, A53 ¶ 5, A57 ¶ 11, A59 ¶ 4): As Dr. Gamble put it, these "limitations [were] placed upon him for his psychological well-being" (App. p. A59 ¶ 4).

The unfocused fear that Petitioner would suffer some relapse into depression if he continued in a stressful management-level job is the kind of discrimination against disabled employees these laws prohibit. The EEOC's interpretive Guidelines on the ADA make this point directly (29 C.F.R. Part 1630, Appendix). In the Guideline under section 1630.2(r), Direct Threat, the EEOC states:

> "Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress,

> cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness."

To be sure, no employer is required to employ someone whose disability poses a real and immediate threat to his physical or mental health. This Court and Congress have already provided specific protection for employers in that situation, which allows consideration of medical opinions as well as other factors as to the immediacy, seriousness and ability to prevent or reduce that risk (School Bd. of Nassau County, Fla. v. Arline, *supra*, 480 U.S.at 287; see also ADA, 42 U.S.C. §12113(b); 29 C.F.R. Part 1630, §1630.2(r)).

But neither of the lower courts found that this limited defense was applicable in this case, nor would the medical evidence before the lower courts sustain such a finding. Dr. Lipsett testified expressly that the risk to Petitioner was merely a possibility, not a certainty (App. pp. A65, A67) and he could provide no medical opinion as to when, if at all, that possibility might occur (App. A65, A66-A67).

Instead, the lower courts considered the medical evidence on the basic issue of job qualification and deferred to the medical judgments that Petitioner was simply unqualified mentally for stressful work.

This Court is, therefore, presented with the stark issue that the lower courts have deferred entirely to the medical judgment of the University's psychiatrists that Petitioner was unqualified for his job because his disability makes him unsuited for stressful jobs. This is precisely the issue this Court left open in Arline and which this Court should now

address and resolve.

The significance of this issue is apparent. Depressive disorders affect millions American adults. National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990; See also, Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986. As in Petitioner, these conditions affect the ability to work:

> "Depressive disorders are among the most prevalent psychiatric conditions, and impairment in occupational functioning is commonplace." (Mintz, "Treatments of Depression", *supra*, at p. 761).

At the same time, depressive disorders, and their impairment of occupational functioning, are highly susceptible to effective treatment and accommodation in the workplace. As the Mintz study cited above concluded:

> "Behavioral impairments, including missed time, decreased performance, and significant interpersonal problems are common features of depression that appear to be highly responsive to symptomatically effective treatment given adequate time." (Mintz, "Treatments of Depression", *supra*, p. 766).

At the same time, because the risk of depression may be increased in stressful occupations, few persons with such disabilities can guarantee their future health against all odds. Similarly, few employers will be unable to find a physician that will give a medical judgment that the employee's disability places them at risk if they continue in a stressful employment. As occurred here, the University was able to convince Dr. Lipsett to retract his initial opinion that Petitioner could safely return to work and issue a new

opinion that Petitioner was unable to perform his job safely under any conditions.

If a single opinion by a physician is conclusive as to the ability of a disabled employee to continue in their job, few disabled employees would be safe in their employment and the goals of the law would be easily frustrated. Few employees would risk seeking accommodations for fear that a resulting medical examination might declare them unqualified and jobless.[11] The ability of disabled employees to seek job accommodation would be undermined. As occurred here, Petitioner's mere request for job restructuring--a request expressly contemplated by the ADA and the Rehabilitation Act[12]--was interpreted by the district court as an additional fact demonstrating his inability to perform the Associate Director position at all (App. p. A32).

The alternative job at UCSF and later rehabilitation services are justifiable only if the lower count's deference to the University psychiatrists' medical opinions was justified. Both the ADA and the Rehabilitation Act require accommodation to an employee's present position before the alternative of a transfer to a different job could be considered.

The Rehabilitation Act regulations prohibit an employer from denying employment opportunities "if the basis for the denial is the need to make reasonable accommodation to the * * * mental limitations of the

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[11] The EEOC's Interpretive Guidelines on medical examinations under the ADA indicate the a medical examination may be required if necessary to decide issues of accommodation (29 C.F.R. Part 1630, Appendix, Guidelines on Section 1630.14(c)).

[12] ADA, 42 U.S.C. § 12111(9)(B); Rehabilitation Act, regulations, 34 C.F.R. § 104.12(b)(2).

employee or applicant" (34 C.F.R. § 104.12(d)).[13] If Petitioner's disability could be accommodated in his position as Associate Director at EH&S, it would violate these regulations to remove him from the Associate Director position to avoid the need to make such accommodations. An offer of a different job cannot substitute for the need to make accommodations at an employee's existing position if such accommodations are possible.

The EEOC's ADA Guidelines make this point expressly (29 C.F.R. Part 1630, Appendix, discussion on Section 1630(2)(o), eighth paragraph):

> "Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship."

Accordingly, the lower courts consideration of alternative employment was necessarily based on the conclusion that no accommodation was possible within the Associate Director position. That conclusion, as Petitioner has shown, was based on the lower courts' deferral to the medical opinions of the University's psychiatrists.

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[13] Identical requirements were contained in the initial Rehabilitation Act regulations issued by the Department of Heath, Education and Welfare (45 C.F.R. § 84.12(d)).

II. THE AMERICANS WITH DISABILITIES ACT APPLIES TO EMPLOYEES WHO WERE SEEKING JOB ACCOMMODATIONS FROM THEIR EMPLOYER ON THE EFFECTIVE DATE OF THE LAW.

The employment provisions of the ADA became effective on July 26, 1992 (104 Stat. 337). At that time, Petitioner was on disability leave and was still seeking accommodation from the University. Among other things, he was still on disability leave and seeking to have the accommodation discussion that had been ordered as a result of the University's internal grievance procedure (App. pp. A11-A12, A13-A17, A79-A80).

In Bazemore v. Friaday (1986) 478 U.S. 385, 395-6, this Court rejected the very position advanced by the lower courts in this case. Bazemore holds that each independent act of discrimination is an independent violation of the law, even when the discrimination began before the law's effective date.

In Bazemore, the employer attempted to justify the continuing effect of a discriminatory salary policy that paid African-Americans lower wages on the grounds that the salary policy was put into effect prior to the effective date of Title VII's application to state and local governments. This Court reversed, holding that each paycheck that the African-American employees received that was lower because of the prior discrimination was an independent and continuing violation of Title VII (id., 478 U.S. at 395-6).

In this case, the continuing refusal to accommodate Petitioner after the effective date of the ADA violated that law, regardless whether the discrimination began before the ADA took effect.

The lower courts' approach to the effective date of the ADA simply frustrates the application of the law.

Recognizing that the ADA imposed new requirements for employers, Congress delayed its effective date two years from the date the law was enacted to give employers time to prepare for it (see 104 Stat. 337). Once effective, however, the ADA was effective for all purposes. There is no exception in the ADA which would allow employers to refuse to accommodate the needs of existing employees simply because their disability was apparent before the ADA became effective or because they requested accommodation before the employer become legally obligated to proved an accommodation to them. The only relevant question is whether, when the ADA became the law, the employer was still in a position to accommodate a disabled employee. If so--and that is the case here--than the ADA applies.

CONCLUSION

For the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue.

Respectfully submitted,

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